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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 429

TOM D. AMER,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondents.

No. 430

YIN KIM,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondents.

Brief for Respondents in Opposition to Consolidated Petitions for Writs of Certiorari.

Statement of the Case.

Petitioners seek Writs of Certiorari to review orders of the Supreme Court of California denying their petitions for Writs prohibiting the respondent trial court, the Superior Court of the State of California, in and for the County of Los Angeles, from further proceedings in the respective cases. As disclosed by the Transcript of the

Record [R. A. 5, R. K. 7],[1] the respective complaints alleged that the defendants (petitioners here) were persons not of the Caucasian race, and were occupying premises limited by contracts, duly recorded, to occupancy by persons of the Caucasian race; the answers raised various issues, including the constitutional questions mentioned in the Petition and supporting brief here. Thereafter petitioners moved the trial court for judgment on the pleadings, arguing their constitutional propositions; when such motions were denied, petitioners sought, and were denied, the above mentioned Writs of Prohibition in the California Supreme Court.

Although technically the respondent in the two cases is the Superior Court, the real parties in interest are the plaintiffs in the cases pending in that Court which are referred to in the petition, and throughout this brief, in referring to respondent and their rights we shall mean the real parties in interest.

This petition, and petitioners' defenses in these cases, represent an attempt by petitioners to add a new right to the property they bought, one which they did not buy and have never had, *i. e.*, the right to use and occupy the property in question. Petitioners purchased their property with knowledge that there was a restriction agreement duly recorded which would prevent all persons except Caucasians from living in the property. No right is taken from petitioners by the restrictions; on the contrary, they seek to take from respondents a valuable property right, that is, the right to live in the sort of a community which their contract was designed to preserve.

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[1]In referring to the Transcript of Record, we shall designate in the *Amer* case as R. A. and in the *Kim* case as R. K.

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Petitioners imply that deeds and agreements restricting use of real property to members of the Caucasian race are new to the law, but, of course, that is not the case. Such restrictions have been in use in many, if not all, of the states for many years and their validity has been universally upheld.

Petitioners contend that the agreement in these cases is unenforceable because, they say, its enforcement would violate the following: (1) the due process and equal protection clauses of the Fourteenth Amendment; (2) Revised Statutes, Sec. 1978 (8 U. S. C. 42), and (3) Articles 55c and 56 of the United Nations Charter. We shall answer these contentions in the order in which they are advanced in petitioners' argument.

I.

Enforcement by a Court of a Contract Entered Into by Private Citizens Is Not Such an Act of a State as Is Prohibited by Any Clause of the Fourteenth Amendment.

Although petitioners do not distinguish between the due process and equal protection clause, there is, of course, a wide distinction and we shall discuss these clauses separately.

(a) The "Due Process" Clause.

Respondents have no quarrel with decisions of this court in *Buchanan v. Worley*, 245 U. S. 60, and in the other cases cited by petitioners (Petition, p. 7), holding that zoning ordinances enacted by municipalities classifying areas as to racial occupancy were acts of the state, in violation of the Fourteenth Amendment. An ordinance adopted by a municipality as an agency of the state is an act of the state, and if it denies due process or equal pro-

tection of the law it is in violation of the Constitution, but that has nothing whatsoever to do with the right of private individuals to contract with respect to their property rights. It is difficult to see how any contract between private individuals could be said to deny anyone due process of law.

In order to determine whether or not the due process clause of the Fourteenth Amendment has been violated, it is wise to consider what that clause means. In *Anderson National Bank v. Luckett*, 64 S. Ct. 599, 606, 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824, this court said:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

Petitioners do not claim that they will not receive an opportunity to be heard when this cause is tried, but, instead, seek to prohibit the trial court from proceeding because the trials might result in decrees enjoining them from living in the restricted houses which they purchased. There can be no such decrees until after the cases have been tried; petitioners then would have the right to appeal. A fair trial and an opportunity to appeal from an adverse decision is due process. The constitutional right to due process does not guarantee any litigant success in his litigation. Clearly there is no actual or threatened violation of the due process clause here; the right to file this petition and have it considered by this court is a part of due process of law.

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(b) THE "EQUAL PROTECTION" CLAUSE.

Petitioners themselves apparently recognize the impossibility of sustaining the argument that the contracts involved in these cases violate either the due process clause, the equal protection clause or any other clause of the United States Constitution or any statute or treaty. They say that "so long as the parties do not seek state aid, the constitutional provision may not be violated." (Petition, p. 8.) In other words, it is the method of enforcement of Respondents' rights under the contracts that is objectionable to petitioners. This argument would seem to concede that if respondents, instead of going to the court in an orderly manner to enforce their contract rights, just as they would have done on a suit on a promissory note or to enforce the specific performance of a contract, had resorted to some form of self-help they would have been within their rights. The idea that a contract can be perfectly valid and binding and yet that the courts cannot enforce it certainly is novel. How would such a contract be enforced? Certainly petitioners would not advocate resort to methods of enforcement which would not seek the aid of the courts.

In support of their argument that the due process and equal protection clauses are being violated, petitioners cite (p. 7) various cases which they say support their argument that, although the agreement itself may be valid, its enforcement by a state court would violate the Fourteenth Amendment. Without reviewing these cases individually, suffice to say, not one of them supports petitioners' position. On the other hand, with the exception of *Dandolfo v. Hartman*, 49 Fed. 181, a very old case in a federal District Court, which never has been fol-

lowed, the reported cases have consistently upheld the constitutionality of race restrictions and their enforcement by the courts. Some of the leading cases are: *Corrigan v. Buckley,* 271 U. S. 323; *Mays v. Burgess,* 147 F. (2d) 869, certiorari denied by this court, 65 S. Ct. 1406; *Parmalee v. Morris,* 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180.

The precise points urged by petitioners has been decided adversely to their contentions in several cases in California, as well as in other states and is discussed by this Court in *Corrigan v. Buckley, supra,* to which we shall refer more fully at a later point in this brief. In *Title Guarantee and Trust Company v. Garrott,* 42 Cal. App. 152, 154, the court said:

> "The fourteenth amendment, it is true, applies to the judicial as well as the legislative department of the state government. But the judiciary does not violate this provision of the federal constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals."

A petition to have the *Title Guarantee* case heard by the California Supreme Court was denied. Shortly thereafter, the California Supreme Court decided a case entitled *Los Angeles Investment Company v. Gary,* 181 Cal. 680, 682. In the opinion in the later case, the Supreme Court said of the opinion in the *Title Guarantee* case:

> "The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing."

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In the late case (1944) of *Burkhardt v. Lofton*, 63 Cal. App. (2d) 230, 238, the District Court of Appeal, in considering precisely the same arguments against the enforcement of a restriction that petitioners urge here said:

> "The decree of the trial court in the instant case was not, within constitutional principles, action by the state through its judicial department. Plaintiffs' rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties. The decree appealed from created no rights in plaintiffs; it only declared what they are and provided for their enforcement. *If the contract is valid it cannot be nullified under any theory that courts are without the power to enforce it.*" (Italics supplied.)

The California Supreme Court denied a petition for hearing in the *Burkhardt* case, so that case also has the approval of the highest court of the state.

Other cases in which the California courts have upheld such restrictions are *Janss Investment Company v. Walden*, 196 Cal. 753; *Wayt v. Patee*, 205 Cal. 46; *Fairchild v. Raines*, 24 Cal. (2d) 818; *Stone v. Jones*, 66 Cal. App. (2d) 264 (1944) (petition for hearing by Supreme Court denied); *Shideler v. Roberts* (1945), 69 Cal. App. (2d) 549. Other recent cases are summarized in a note in 162 A. L. R. 180.

II.

Section 1978 of Revised Statutes Is Not Violated.

> "The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendants under the Constitution, there can be none under the statutes."

This language from the lower court in *Corrigan v. Buckley*, 299 Fed. 899, 902 states very aptly respondent's position.

The same arguments and cases as demonstrate the constitutionality of the restrictions uphold respondents' contention that Section 1948 of Revised Statutes is not violated. Private action by private citizens is not involved in that section of the Revised Statutes and certainly if the requirements of due process and equal protection are met, no one is being deprived of any right. We need only remind ourselves of the fact that petitioners acquired title to the property in question with knowledge of the restriction and forthwith violated it. They did not purchase the right to occupy the property; obviously they could not acquire such a right by their deliberate and premeditated violation of the restriction. How can they be deprived of a right they never had?

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III.

The United Nations Charter Does Not in Any Way Affect State Court Enforcement of Contracts Entered Into by Private Citizens of the United States.

It is, of course, true that treaties of the United States are the supreme law of the land, but the sections of the Charter of the United Nations quoted by petitioners (p. 10) have no application in the instant case. Nothing in that Charter purports to pledge the United States to interfere in the private contractual rights of its citizens.

This case involves a question of whether respondents can *maintain* certain rights that they have had or whether petitioners can *acquire* certain rights that they never have had, *i. e.*, the right to occupy certain property which they willingly bought, even though they knew that their predecessors in title had agreed with the owners of other properties in the community that it should not be used or occupied by persons other than of the white or Caucasian race. Petitioners, upon their purchase of the properties, became bound by that solemn contract. They now seek to abolish the long-recognized rights of their predecessors, and of plaintiffs, so to limit the use of that property.

There is no lack of "respect" for "human rights" on the part of respondents. They merely seek to maintain their own right to live in the type of community they prefer, against persons who seek to destroy that right, and by so doing to add to their property new rights they did not purchase or otherwise acquire.

None of the cases cited by petitioners (p. 10) have any application to the facts in this case.

IV.

Corrigan v. Buckley, 271 U. S. 323, Has Not Been Misinterpreted.

Petitioners (p. 11) state that in *Corrigan v. Buckley*, "There was no question of a court enforcing the agreement and ordering a citizen owner out of his own house." An examination of the case, and of the report of the case in the lower court discloses that plaintiff filed a bill of complaint to restrain defendant Corrigan from conveying certain real estate in the District of Columbia to defendant Curtis, who was a Negro, and to restrain defendant Curtis from using or occupying the same, each of which acts would violate a restriction agreement which had been entered into by plaintiff and defendant Corrigan and 28 other persons who owned land in the immediate vicinity. Defendant Corrigan had entered into a contract with defendant Curtis to sell him the house. Defendant Curtis filed a motion to dismiss the bill on the ground that it was void because it deprived him of property without due process of law, it abridged the privileges and immunities of citizens of the United States, and denied equal protection of law. The trial court denied the motion and defendants elected to stand on their motion and a decree of injunction was entered. Certainly, this was a question of a court *enforcing* the agreement. True, a "citizen owner" was not ordered out of his own house, but only because the bill was filed before the conveyance had been executed and before defendant Curtis had entered into use and occupancy of the premises.

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Petitioners have completely misconstrued the factual situation in the *Corrigan* case when they state (p. 11) that "the mere making of an agreement without asking a court of equity to *enforce* it was not action by government but was simply action between private individuals." The trial court *had entered a decree to enforce the agreement* and the appeal was from such entry.

Petitioners then quote (p. 11) certain language of this court which appears on page 331 of the *Corrigan* case. Their first quotation ends wth a semi-colon and omits the very significant ending of the sentence quoted. The words omitted are, *"and it likewise is lacking in substance."* In other words, this court pointed out, that the contention made by appellants there, and by petitioners here, that the court decree itself violated the Constitution, was not raised in the petition so it could not serve as a basis for the appeal, but this court added the pertinent conclusion that such contention was "lacking in substance." And although the statement omitted by petitioners may be *dictum*, it is an expression of opinion by this court on the very contention herein urged by petitioners. So although it may be true that this court did not have to pass on the contention, it is equally true that this court considered it "lacking in substance."

Conclusion.

Although petitioners refer to the critical housing situation, such discussion is entirely outside the record. We are here concerned only with these petitioners and these restrictions. There is no evidence in the record to disclose whether or not petitioners, or either of them, are victims of the nationwide shortage of housing, and if there were it could not affect respondents' rights under the contract, nor add anything to petitioners' rights. Neither is there evidence of any "extension" (Petition, p. 12) of the restrictive covenant and petitioners' gratuitous remarks on that subject have no place in their proceeding.

Conjuring up various types of agreements which someone someday might enter into or seek to enforce is to no purpose here. As said in *Stone v. Jones* (*supra*), 66 Cal. App. (2d) 264, 269:

> "Collateral possibilities or indirect consequences are beside the issue. Changes or the likelihood thereof, incident to the growth of a community, may create or forecast perplexing social problems, but such problems, from the very nature of things, cannot be solved by the courts in the process of litigation of a purely private nature. Any attempt to do so would be an unwarranted interference with the functions of other branches of the government already equipped with power and means for the comprehensive consideration of such problems."

Petitioners speak often of "rights," but they refuse to recognize the rights of respondents. They completely ignore the facts. We submit once more, petitioners willingly bought homes they knew they would not be entitled to occupy. They got what they paid for. Can this court now give them something more than they bargained for, thereby depriving respondents of rights which are precious to them?

We respectfully submit that the many decisions hereinbefore cited upholding the constitutionality of these agreements are sound, and well-reasoned and that petitioners have advanced no contentions sufficient to change the established law, nor to justify the granting of the Writs which they seek.

Respectfully submitted,

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